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No. _____

In the Supreme Court of the United States

DAN BAGBEY,
Petitioner,

-v-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

WHETHER A DEFENDANT MAY BE DENIED A FAIR TRIAL BY THE REFUSAL OF THE TRIAL JUDGE TO RULE *IN LIMINE* ON THE ADMISSIBILITY OF "OTHER ACTS" EVIDENCE UNDER RULE 404(b), FEDERAL RULES OF EVIDENCE.

TABLE OF AUTHORITIES

OPINION BELOW

The Order of the Sixth Circuit Court of Appeals affirming the Petitioner's conviction is set forth as Appendix A.

JURISDICTION

The Order of the Sixth Circuit Court of Appeals affirming the Petitioner's Conviction was filed September 20, 1983. This Court's jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari invoked under 28 USC §1254(1).

PROVISIONS OF LAW INVOLVED

Rule 404(b), Federal Rules of Evidence, provides as follows:

> "Other Crimes, Wrongs or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

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STATEMENT OF THE CASE

Petitioner was charged along with seven others in an 18 Count Indictment alleging various cocaine-related offenses. The government's case consisted essentially of the testimony of accomplice witnesses, who had themselves been charged with the deliveries of cocaine which made up the alleged activities of the conspiracy, and who had agreed to testify against the petitioner and his co-defendant in exchange for leniency in sentencing on those charges.

It was the core of the testimony that Petitioner, a state court bailiff, introduced the co-defendant, Robert Cox, an alleged supplier of cocaine, to the accomplice witnesses, who themselves distributed the cocaine. Both of those accomplice witnesses, Vincent Frigerio and Anthony Berna, testified that

they had had meetings with Petitioner Bagbey and the Co-Defendant Cox, and had received cocaine from him and in his presence, from Cox. Additionally, Berna testified that Petitioner and a Co-Defendant, Aslam Halim, were to have provided "security" for a cocaine transaction in which Cox, Halim, and Berna were arrested.

There was no surveillance testimony, however, of any meeting or contact between Berna or Frigerio and the Petitioner, and except for telephone toll records which show that telephone calls had been made between the Bagbey and Cox residences, there was no physical evidence introduced which connected Petitioner in any way with any of the events to which any of the witnesses testified. The Defendant Cox testified on his own behalf, as did another Co-Defendant. Petitioner then moved, *in limine,* for a ruling from the trial judge as to the admissibility of certain "other acts" evidence of which the government claimed to have knowledge. In the course of this motion, he outlined the nature of the testimony which he would give, which was limited to an acknowledgement of his acquaintanceship with three of the co-defendants, and a denial of the specific allegations of the indictment. The trial court, however, declined to rule *in limine*, and, based upon this refusal, the defendant elected not to testify.

The jury convicted Petitioner of the conspiracy charged in the indictment, acquitting him of the single substantive act with which he was charged. He was sentenced to four years in the custody of the Attorney General, and appealed his conviction and sentence to the Sixth Circuit Court of Appeals, as of right. On September 20, 1983, in a sixteen page "Order," that Court affirmed the convictions and sentences of all of the defendants.

REASONS FOR GRANTING THE WRIT

The case before the Court illustrates both the confusion in the lower courts regarding the proper scope of Rule 404(b), Federal Rules of Evidence, and the need for guidance in those courts as to the circumstances under which a ruling as to admissibility of "other acts," evidence under that Rule should be made in advance of a defendant's election to testify or not.

After the government concluded its proofs, and prior to the time when the petitioner Bagbey was called upon to present his case, he moved, *in limine*, for a ruling from the trial court regarding the propriety of anticipated government cross-examination of the defendant, should he testify, regarding "other acts" on the part of the petitioner which the government claimed to have knowledge, but declined to reveal.

Petitioner outlined the testimony that he would adduce: he would acknowledge "that he knows Mr. Cox, that he knows Mr. Halim, that he knows Mr. Berna, that he knows Mr. Frigerio, that he enjoys a social relationship with Mr. Cox and his family and enjoys a social relationship with Mr. Cox's family" and that he would then go through the allegations of the indictment as to him, and simply deny them one at a time. (14 T, p. 1938)* Acknowledging that the government was by no means required to reveal to him its evidence, defendant indicated that he was prepared, for the sake of argument on his motion in limine, to accept that the government "can prove by competent evidence that Mr. Bagbey did on another occasion exactly what he's charged

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* The trial transcript comprises approximately 20 volumes. It is, for the most part, consecutively numbered, except for some of the early volumes. Because of the inconsistency in the numbering, references to the trial transcript will be designated by the volume of transcript, followed by the letter "T" and the page number.

with" in the case at bar — that is to say, that the government could prove an exactly similar act. (14 T, p. 1939) Petitioner asked the court to rule, however, based on his own offer of proof as to the testimony that he would give, that no "other acts" testimony would be permissible — even the hypothetical exactly identical act — because none of the matters for which "other acts" evidence might be allowed were genuinely in issue given the circumstances of the case at bar. (*Ibid.*)

Petitioner's counsel indicated that while defendant's naked denial of the allegations of the indictment might ordinarily not seem to be of real value to the defense, in the circumstances of the case at bar, where several of the co-defendants had or would testify on their own behalf, Mr. Bagbey's profession of innocence under oath seemed, as a tactical matter, to gain importance. (14 T, pp. 1939-1940) After some brief colloquy between the court and counsel, the trial judge deferred ruling on the matter.

Later on the same day, the trial judge raised the question again, at this point suggesting that it might be necessary to know the nature of the "other acts" evidence before ruling on its admissibility. (14 T, p. 2000) Petitioner expressed a willingness to have government counsel make an offer of proof to the court *in camera*, but the government declined to make such a proffer. (14 T, p. 2001) By the time the court ruled on the motion the next morning, the trial court had come to focus almost exclusively on the question of disclosure of the "other acts" evidence, and ruled that unless the government volunteered such disclosure *in camera* or otherwise, it would not rule on the admissibility of the evidence in advance of the defendant taking the stand. (15 T, p. 2061) When the time came for the petitioner to put in his case, he rested without testifying in his own behalf. (15 T, p. 2136) Counsel represented to the trial court that the only reason for his not testifying was the trial court's ruling on the motion in limine, and offered to put

the defendant under oath in order to establish this fact, but neither the trial judge nor the Assistant United States Attorney accepted the offer, the court stating at one point "I'm not interested in the reason" for the defendant's decision not to testify. (15 T, p. 2137) The entire colloquy between court and counsel on this point is as follows:

> MR. LARENE: My client has decided he will not testify. I represent to the Court and I'm prepared to put Mr. Bagbey under oath and testify to this, that the reason, and the only reason for that decision, not to testify is the Court's ruling on my motion in limine.
>
> THE COURT: You can make whatever representations you want Mr. LaRene. I don't — you've made your statement for the record.
>
> MR. LARENE: As I say, I think it's important —
>
> THE COURT: Mr. LaRene, you've made your statement for the record and the Court has made it's observations.
>
> Are you going to call a witness, sir?
>
> MR. LARENE: I have said that if there's any question as to the reason for the decision —
>
> THE COURT: I'm not interested in the reason sir. You're entitled to give the reason for the record.
>
> Mr. Papelian do you have anything?
>
> MR. PAPELIAN: No, your Honor.
>
> THE COURT: Thank you.
>
> (15 T, pp. 2136-2137)

As noted above, the trial court's concern focused on its lack of knowledge of what the "other acts" evidence was, and

ultimately held that disclosure by the government was an absolute precondition to any ruling on the motion in limine in advance of the defendant's testimony:

> THE COURT: Okay.
>
> I'm going to accept the Government's good faith representations at this point and I think, again, without an adequate factual record, the Court cannot rule in limine on this kind of matter and the Court is not asking the Government to disclose, in advance. The Government has the option to disclose to the Court in camera if it proposes.
>
> (15 T, p. 2066)

In effect, of course, this ruling by the court ceded to the government the ultimate control over whether the defendant would have the benefit of a ruling (either favorable or unfavorable) on the motion in limine prior to his direct examination. Of course, the government chose not to make the *in camera* presentation with respect to the petitioner, even though it had previously made such a presentation with respect to certain "other acts" evidence which it sought to use against the co-defendant Aslam Halim; interestingly, once that presentation was made with respect to Halim, the trial judge ordered disclosure to be made to Halim and subsequently ruled *in limine* prior to the defendant Halim opening his proofs that the "other acts" evidence would not be admissible on cross-examination of him. (15 T, pp. 2142-2146)

In so ruling, the court disregarded the crucial thrust of petitioner's motion — that *no* "other acts" evidence would have been appropriate because the defendant's proposed testimony would not have put into issue any purpose for which such evidence could have been properly admitted. This, of course, was the thrust of petitioner's repeated suggestion that the trial court rule on the assumption that the government could prove

contemporaneous acts identical to those alleged in the indictment. (see, *e.g.*, 15 T, p. 1939, 16 T, p. 2063) Of course, government counsel indicated that whatever the "other acts" were, they did not involve, for example, cocaine purchases, or anything "so similar." (16 T, p. 2065)

The petitioner's proffer with respect to his testimony was definite, clear and certain. It was to be skeletal in the extreme, and would have, as represented by defense counsel, gone no farther than acknowledging acquaintanceship with Berna, Frigerio, Halim and Cox, as well as a social relationship between the Bagbey family and the Cox family, and a simple denial of each of the allegations of the indictment as to him. (14 T, p. 1938) Neither the trial court nor the Assistant United States Attorney ever questioned the sufficiency of these representations to establish an adequate framework for the motion in limine, and, of course, as is made clear by the fact that the court willingly ruled on a similar motion in limine with respect to the defendant Halim without having *any* representation as to how Halim would testify, it is clear that it was not the sufficiency of the offer of proof from the defendant which formed the basis for the court's denial of the motion in limine.

The only basis upon which the government even suggested, given the offer of proof, a possible basis for admission of any "other acts" evidence at all, was on the question of "knowledge" or "intent." (14 T, p. 1945) It was clearly argued to the trial court, and clearly represents the law of this circuit, that, given the defendant's proposed denial of participation in the charged events, "extrinsic act" evidence would not have been proper because neither knowledge nor intent would have been put in issue thereby.

In the leading case of *United States v. Ring*, 513 F2d 1001, 1007-1008 (6th Cir. 1975), the Sixth Circuit, in holding that

"other acts" evidence is not admissible on the question of "intent," unless "intent" is a genuinely contested issue in the case, explained the difference between those situations in which "intent is in issue," and those situations in which it is not:

> Certainly, intent is in issue whenever it cannot readily be inferred from proof of the criminal act charged.
>
> * * *
>
> Here, on the contrary, if the act were proven, intent would naturally be inferred . . . .
>
> * * *
>
> A different case would be presented if the defendant had raised the issue of intent by pleading that the act, if done, was done innocently, by mistake or accident.

In *Ring* the defendant was charged with mailing threatening letters, and the government sought to introduce evidence of other threats made by the defendant to another person at another time. This Court held that such evidence was not admissible, because the defendant's defense was not that the letters were mailed by mistake, inadvertence, or with an innocent state of mind, but, rather, that he did not mail the letters at all. As the Court noted, since the letters were clearly threatening on their face, if the defendant was found to have mailed them, his wrongful intent "would naturally be inferred." The defense interposed, that the defendant did not mail the letters, did not, therefore, place the question of his intent in mailing them in issue, but only put in issue the question of whether he mailed them at all.

Similarly, the petitioner's proposed testimony in the case at bar, and the theory of his defense was that he did not participate in the discussions and actions attributed to him by the allegations of the indictment (and, inferentially, by the witnesses who testified against him). As represented to the trial court, he

would not have, in the course of his direct testimony, acknowledged any part of the allegations made against him while attempting to cast an innocent or unknowing light upon them; rather, the proposed testimony and theory was nothing but simple and outright denial. Given the fact that no physical evidence, police surveillance or any other evidence or testimony other than the two accomplice-witnesses connected the defendant Bagbey in any way to any of the acts or occurrences alleged, this simple outright denial was not only realistic, but of real potential value to the defendant. The question which the defendant sought to put in issue by his testimony was whether he did the things alleged in the indictment, not the intent or state of mind with which he did them.

The distinction is well illustrated by the decision of the Second Circuit Court of Appeals in *United States v. Benedetto*, 571 F2d 1246 (2d Cir. 1978). Benedetto was a federal meat inspector, who was charged with accepting bribes. The government introduced evidence of other, uncharged instances of bribery. The court held that such evidence was inadmissible on the issue of intent, because (as here) the defense was not that the defendant did the acts charged, but with an innocent state of mind, but rather that he did not do the acts at all:

> We are not impressed by the Government's argument that this evidence was relevant to Benedetto's knowledge and intent. Defendant did not claim that he took the money from the four companies named in the indictment innocently or mistakenly. He claimed that he did not take the money at all. Knowledge and intent, while technically at issue, were not really in dispute . . . 571 F2d *supra* at 1249 (citations omitted).

Similarly, the case at bar, the defense was not that defendant did the alleged acts, but with an innocent state of mind, but rather that he did not do the acts at all.

In *United States v. Manfazadeh*, 592 F2d 81 (2d Cir. 1979) defendant was charged with being the mastermind of an elaborate check fraud scheme, and the government was permitted to adduce evidence of his subsequent attempts to recruit another person into a vaguely similar enterprise. Noting that "there is no presumption that such other-crimes evidence is relevant," the court held that the evidence had been improperly received because "the issue before the jury, however, was not Manfazadeh's intent, but whether he had anything to do with the creation or deposit of the six fraudulent checks alleged in the indictment or the use of those checks to defraud the Chase Manhattan Bank." 592 F2d *supra* at 86-87. As the court explained the matter:

> There was no assertion to the effect that Manfazadeh may have participated in the creation or use of the six fraudulent checks but that he did not realize that they were written on a nonexistent account or that the signatures on the checks were unauthorized. Nor did Manfazadeh defend himself on a theory that he did not intend the six phony checks to be deposited. His defense was simply that he had nothing to do with the creation of these fraudulent checks or the use of these checks to defraud Chase Manhattan Bank. 592 F2d *supra* at 87.

The instant case is analytically identical to *Manfazadeh*, because the defendant in the instant case wished simply to deny having done the acts alleged in the indictment. He did not seek to defend himself on the theory of mistake, accident, or other innocent state of mind, but rather on the theory that he did not do what the government said he did. As such he did not put his state of mind ("knowledge" or "intent") in issue any more than did Manfazadeh, Benedetto or Ring, and the admission of the "other acts" evidence in this case was as clearly improper as it was in *Manfazadeh*, *Benedetto* and *Ring*.

The trial judge at first seemed to clearly grasp the issue:

> THE COURT: I understand what you are saying in that Mr. Bagbey denies participation in a conspiracy. There is no act that he performed or that could be illicited which is capable of two interpretations, one innocent, and one guilty.
>
> MR. LARENE: Yes, sir.
>
> THE COURT: And therefore, since he denies participation, or he denies engaging in any act which could be interpreted as participation, intent is not an issue.
>
> MR. LARENE: That is correct.

(14 T, p. 1940)

However, the court seemed ultimately to lose sight of the significance of this principle, as it came instead to cede advance disclosure of the government's evidence as the nub of the question before it — disclosure which was never asked by the defendant and which was, in his view of the legal issue presented, wholly unnecessary and wholly irrelevant. At one point, however, Judge Cohn characterized the motion in limine as "a very artful attempt to have the Government disclose cross-examination" (15 T, p. 2067), and at another he described the motion as coming "perilously close to asking the Court to rule in advance so that the defendant may shape his testimony to meet the Court's ruling." (15 T, p. 2063)

While it is always nice, of course, from the standpoint of the trial lawyer, to know in advance what an adversary's cross-examination of one's witness will be, the trial court's suspicions in the instant case were thoroughly unfounded, and apparently skewed its ruling to the extent that it lost sight of the principle which would have compelled a ruling in the defendant's favor, had it been properly applied. Disclosure was, as noted above,

absolutely irrelevant to the theory of the petitioner's motion and would not have aided the court in the decision of that motion in any regard, because it was the shape of the petitioner's testimony (fully disclosed to the court and to the government in connection with the motion in limine), and not the shape of the "other acts" evidence which, under such cases as *United States v. Ring, supra*, would compel the exclusion of the "other act" evidence.*

The primacy of the right to present a defense is well recognized by the appellate decisions. Thus, in *United States v. Thomas*, 488 F2d 334, 336 (6th Cir. 1973) this Court recognized that "the fundamental nature of the accused's right to present witnesses in his own behalf" renders conduct which impairs that right reversible error *per se*, without any allegation of prejudice, and without considering the nature of the proofs against a defendant who raises such a claim. See, also, *United States v. Hammond*, 598 F2d 1008, 1012-1014 (5th Cir. 1979). Judge Weinstein has noted "the policy of encouraging defendants to testify" in criminal cases, and has noted as well that this policy is appropriately effectuated by advance rulings regarding the scope of cross-examination where the issue is adequately framed for decision,

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* The trial judge's apparent suspicion of the defendant's motives in this regard was somewhat at odds with another aspect of his skepticism about the matter, which may have also somewhat flawed the rationale of the ruling. At one point, the court noted: " presumably whatever these other acts are, if they exist, the defendant is aware of them." (15 T, p. 2061) This "presumption" is, of course, directly at odds with the presumption of innocence with which the defendant was supposedly cloaked at this point in the proceedings, and seems also at odds with the trial judge's conclusion that all the defendant and defense counsel were trying to do was to get an advance look at the government's evidence. While the statement of the trial court is certainly wrong and wrongly made, it is difficult to assign error to it in any specific regard, since it is not clear to what extent this "presumption" formed the basis for the court's ruling (as opposed to the court's thinking.)

so that "defense counsel can make an informed decision whether to put his or her client on the stand." *United States v. Jackson*, 405 F Supp 938, 942 (EDNY 1975).

Against the general background of these considerations, it seems clear that, in the context of the case at bar, it was error for the trial court to refuse to rule in advance of the petitioner's testimony. Petitioner does not contend that a trial judge must, in every case, give the defendant the benefit of a ruling in advance as to the scope of cross-examination with respect to "other acts" evidence, or in any other particular, although, it seems that there is a clearly recognized duty on the part of trial judges to hear and resolve closely similar matters, such as proof of prior convictions, when a timely request is made in advance of the defendant's testimony. See, *e.g.*, *Jones v. United States*, 402 F2d 639, 643 (DC Cir. 1968). Rather, it is the position of the petitioner that, since the trial court had all that it needed to make a decision before it, and since the making of that decision would have a manifest effect on the petitioner's presentation of his case, and the completeness of the truth-finding process, it was error to decline to make it, especially since the ruling contended for by the defendant was clearly compelled by the applicable law. To the extent that a trial court has discretion in these matters, the trial court's exercise of whatever discretion it might have had in the instant case was fatally skewed by its misperception of the applicable variables, or by the correct standard of law. To that extent, the trial court's discretion was clearly abused. Indeed, the arbitrariness of the trial court's handling of the defendant Bagbey's motion *in limine* is well illustrated by the fact that a similar motion was heard and granted in the case of a co-defendant who did not even make an offer of proof as to his testimony, and where the trial record, at least, does not even indicate the details of the "other act" which the trial court ruled inadmissible. (Although, in fairness, the trial record does suggest that at one point some "information"

about the "other act" regarding Halim had been submitted to the court *in camera*.) (15 T, pp. 2142-2146)

It is, of course, settled law that where a defendant who — as the appellant here — decides not to testify based upon a trial court's ruling *in limine* regarding the scope of cross-examination, may appeal the propriety of the trial court's ruling. See, *e.g.*, *United States v. Cook*, 608 F2d 1175, 1183 (9th Cir. 1979) (*en banc*). The representations made by counsel in the case at bar regarding the reason for the defendant's decision not to testify were clear and specific, and the only reason that the defendant did not under oath acknowledge that he decided not to testify solely because of the trial judge's decision on the motion in limine was that the trial court rejected that offer indicating that he was "not interested in the reason sir." (15 T, p. 2137) And of course, the petitioner's offer of proof regarding the testimony which he wished to give was equally clear, specific and sufficient to preserve the issue of the propriety of the trial court's ruling regarding the scope of cross-examination for appellate scrutiny. Compare, *United States v. LeBlanc*, 612 F2d 1012, 1014 (6th Cir. 1980).

The Court of Appeals, however, held that the trial court's ruling was not improper, and, despite its previous ruling in *United States v. Ring, supra*, held that "similar acts" evidence might well have been admissible. That court did not explain, in its order, how the issue of intent might properly be held to have been placed in order by the defendants skeletal denials of involvement, or how the trial court's ability to determine whether or not that issue was indeed genuinely in dispute would be aided by actually hearing the defendants testimony, or the facts of the "similar act." The Sixth Circuit's ruling, as well as that of the trial judge, illustrates the kind of almost schizophrenic handling which Rule 404(b) has received in the lower courts. On the one hand, decisions like *United States v. Ring, supra*, have established limitations on admissibility, on

the other hand, cases like the case at bar have given lip service to those limitations, while effectively stripping those limitations of any practical effect. Moreover, the refusal to rule "in limine" the question reserved almost exclusively to the discretionary authority of trial judges, not only does not encourage a defendant to testify, but clouds the right of a defendant to testify on his own behalf with a requirement that he run the guantlet of the possibility of being cross-examined with unknown, undisclosed "other acts" evidence, and that he make a decision as to whether or not to testify in the relative dark — that he "roll the dice" so to speak, when requiring him to do so is neither logically compelled nor necessarily accompanied by a greater degree of fairness to either defense or prosecution.

This Court should, in the exercise of its supervisory jurisdiction over the courts below, and in order to assure a fair and uniform application of the Federal Rules of Evidence, grant this Petition for a Writ of Certiorari, and, affirming the limitations on Rule 404(b) set down by such cases as *United States v. Ring*, not only reverse the Petitioner's conviction herein, but set out some general principles to guide the lower courts in the application of that Rule. Additionally, the Court should give guidance to the Federal Trial Bench as to the appropriateness of rulings *in limine* in situations such as that posed by the case at bar.

CONCLUSION

Because of the trial court's erroneous ruling on the Petitioner's Motion In Limine regarding "other acts" evidence, Petitioner's fundamental right to testify on his own behalf was effectively and unconscienably chilled. That ruling not only requires the reversal of Petitioner's conviction, but also bespeaks a need for guidance by this Court as to the proper scope of Rule 404(b), Federal Rules of Evidence, and the appropriateness of ruling *in limine* in advance of a defendant's testimony, in order to encourage the intelligent making of a choice as to whether or not a defendant in a criminal case will testify on his own behalf.

Respectfully submitted,

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Nos. 82-1170/77/78/1235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed September 20, 1983)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ORDER

DAN BAGBEY, GLENN GATT,
ROBERT COX and ADALGISO MANCINI,
Defendants-Appellants.

Before: KENNEDY, CONTIE, and WELLFORD, Circuit Judges.

An eighteen-count indictment and superseding indictment returned in the Eastern District of Michigan charged defendants Daniel Bagbey (Bagbey), Robert Cox (Cox), Adalgiso Mancini (Mancini), Glenn Gatt (Gatt) and other co-defendants with charges of criminal conspiracy and each one in various counts of being involved in substantive offenses of possession of controlled substances with intent to distribute, alleged violations of 18 U.S.C. § 841(a)(1) and 18 U.S.C. § 846.[1] After convictions and/or guilty pleas and sentences imposed on the defendants on a number of counts, four of the defendants have appealed their convictions asserting different grounds of error in seeking relief before this court. We shall consider each of the defendants in turn, although some issues are common to more than one of them. Anthony Berna and Vincent Frigerio, original defendants who plead guilty to some of the charges involving drug conspiracy and distribution, were key government witnesses in this case against the

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[1] Cox was also charged with unlawfully carrying a firearm during commission of a felony in violation of 18 U.S.C. § 924(a)(2).

defendants who appeal their convictions and sentences. Berna met defendant Bagbey, a court officer in Westland, Michigan, through one John Bommarito, and in December, 1979, Bagbey set up a meeting between himself, Berna and Cox, a fireman, in the latter's car in the parking lot of Berna's apartment complex to discuss drugs. The actions involving the various members of the drug conspiracy in this case began with the December, 1979, meeting and continued into May of 1980. We first consider the issues raised by the defendant who arranged the first meeting concerning cocaine distribution.

BAGBEY

Bagbey's first contention is that he was denied a fair trial by the court's refusal to limit, in advance, cross-examination, if he chose to take the stand, about acts of a criminal nature but not specifically charged against him in the indictment. Bagbey admits that a ruling under such circumstances involves the exercise of discretion, but he charges that the trial judge abused his discretion in not granting his motion at the outset of the opportunity for defendants to put on proof. He was made aware at the very outset of trial by notice from the government that it intended to introduce evidence of the dealing by some defendants in other drugs besides cocaine, the only controlled substance specified in the indictment. Bagbey's counsel, in support of his motion *in limine*, stated that Bagbey would acknowledge that he knew a number of the defendants, but would take the stand to deny "the allegations of the indictment as to him, and simply deny them one at a time."[2] He acknowledged "for the sake of argument" that the government, however, could prove "an exactly similar act" to the one charged in the indictments against him.[3] He requested

[2] Defendant Bagbey's brief, page 6.

[3] Defendant Bagbey's brief, page 6.

that the court limit cross-examination as to any other such criminal acts on Bagbey's part before his time to indicate whether he would present any proof. The court at first deferred ruling on this motion, and then denied the motion since the government made no proffer as to what "other acts," about which it would or might cross-examine Bagbey. He now contends that Bagbey was forced to exercise his right not to testify solely because the court failed to give him the requested *"in limine"* ruling in advance, and that this denial by the trial judge was erroneous abuse of discretion, relying upon *United States v. Ring*, 513 F.2d 1001, 1007-08 (6th Cir. 1975).

This reliance by Bagbey on *Ring*, however, is misplaced. Judge McCree, the author of that opinion, acknowledged that a defendant's prior misconduct may be admissible to show "motive, intent, absence of mistake or inadvertance, identity of the offender or a common plan, pattern or scheme" but indicated that admission of such evidence should be accompanied by limiting instructions to the jury. *Id.* at 1004.

> To show 'intent' with evidence of other misconduct, there must be a substantial similarity between the offenses charged in the indictment and the prior misconduct.

Id. at 1005.

The trial judge in this case, however, could not know in advance, exactly what other alleged acts or prior misconduct may have been involved except that arguably they were "exactly similar" in nature and thus presumably admissible against Bagbey on the question of intent, and probably admissible on other grounds of exception to the general rule enumerated above as well. It was not error for the trial judge to refuse to give Bagbey what amounts to an advisory ruling in advance under these circumstances.

This court, moreover, has recently decided, in another challenge to a district court's decision to deny an accused

defendant's motion *in limine* to preclude cross-examination on a prior criminal offense, that "persuasive policy reasons dictate that the better rule is to require that the defendant testify and the impeaching conviction be admitted *before an appellate court will review for reversible error.*" *United States v. Luce, et al.*, ____F.2d____ (6th Cir. #82-5326, 8-9-83, slip op. p.5) (emphasis added). Furthermore, a district court need not rule on such a motion *in limine*. *United States v. Luce* (slip op. p. 6).

Bagbey argues, however, that general denial of the drug conspiracy and substantive act involving distribution of cocaine does not put his "intent" at issue, so as to justify admission of similar alleged acts, again citing *United States v. Ring*. We disagree. *Ring* involved the charge of mailing threatening letters in violation of 18 U.S.C. § 876 par. 3, and the court found that the government's fingerprint proof of the threatening items actually mailed in the absence of defendant's claim of mistake or inadvertence, did not put "intent" to mail the letter at issue, "because of the nature of the crime and because the defense of an innocent mind was not asserted by the defendant." 513 F.2d at 1009. We think the facts involved pertinent to the issue of admission of other alleged acts in the *Ring* case are clearly distinguishable from the facts here, and that *Ring* is simply not authority for a defendant to demand a procedure that would permit him to deny on the stand that he was involved in the drug distribution activities charged and limit the government in its cross-examination of him about potential other similar conduct of his that could or might tend to show his intent, or even involvement in a common plan, pattern or scheme. *See United States v. Trevino*, 565 F.2d 1317 (5th Cir.), *cert. denied*, 435 U.S. 971 (1978); *United States v. Hamilton*, 684 F.2d 380 (6th Cir.), *cert. denied*, 103 S. Ct. 312 (1982).

Bagbey's other principal issue is that the district court erred in giving the following instruction:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a defendant's intent from the surrounding circumstances. You may consider any statements made by a defendant, and all the other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said it is entirely up to you what facts to find from the evidence.

In reviewing the instructions given the jury in their entirety, we find them neither misleading nor confusing in that it was made clear that the government had the burden of establishing beyond a reasonable doubt that the defendants committed the criminal acts charged, and that they acted with the requisite specific bad intent. A similar instruction was approved by this court in *United States v. Reeves*, 594 F.2d 536, 541 (6th Cir. 1979) and defendant Bagbey concedes as much in his brief. We find no error in the action of the district court in this regard.

COX

Berna testified that at their first meeting Cox produced quaaludes and wanted to know if Berna had any customers for them, and also discussed whether Berna would be interested in selling cocaine. Berna took quaalude samples to Frigerio's home and another meeting was arranged with Cox. This next meeting in January, 1980, also included Bagbey as well as

Cox, Frigerio and Berna at the same location as the first meeting. They discussed the price for a large quantity of quaaludes, and samples were again delivered by Cox. Bagbey later advised Frigerio that the proposed deal was not a good one and it was never consummated. There was also evidence of a later discussion between Cox and Frigerio about marijuana in Bagbey's office at the same time Frigerio testified that Cox advised that he and others had a plane in Columbia loaded with cocaine and marijuana. Frigerio testified also that he was asked to help find a pilot, and if he could assist he would receive 10,000 pounds of marijuana for resale. In February, 1980, there was further similar discussion between Cox and Frigerio; Cox indicated he was calling Miami to confirm arrangements to obtain marijuana. Telephone records received in evidence tended to show that defendant Mancini was the source of supply in Miami. Cox delivered small quantities of cocaine to Berna at the fire station where he regularly worked according to Berna's testimony. Cox testified that he knew co-defendants Bagbey and Mancini, and that he also knew Berna and Frigerio; he denied, however, that he had ever engaged in criminal activities with any of them. He contended he was dealing with them in an attempt to establish an export business in used automobile parts for shipment primarily to South America by and through Mancini.

There was other evidence involving meetings between co-defendants, including Berna, Frigerio, and Cox with respect to distributing cocaine during April and May of 1980.

Cox's attorney attempted to cross-examine the government's witness, Berna, about a meeting at Berna's daughter's farm in South Lyon, Michigan, in April of 1980. It was Cox's contention that Berna was implicating him wrongfully in drug dealing, in part, to cover up Berna's own illegal activity in an arson scheme involving his daughter. The government attorney objected to Cox's attempt to question Berna about an

attempt to procure Cox's involvement in an arson scheme which was allegedly a purpose of the April meeting, instead of cocaine dealing. The trial court sustained the government's objection but only after carefully questioning Cox's attorney about his basis for such a charge, and questioning of Berna.

In this trial episode resulting in the court's evidentiary ruling which Cox contends offended his constitutional confrontation rights, Cox's attorney first inquired of witness Berna about his daughter's husband, a Southfield, Michigan, police officer. Then he asked Berna whether he had been charged along with his son-in-law with arson when the prosecution's objection was made. The court asked Cox's counsel the factual basis for this inquiry. The response was that he had a copy of a transcript indicating that Berna's son-in-law had been charged with burning a barn, and an arson investigation had indicated that Berna was instrumental in setting the fire. It was pointed out to the court, however, that the arson charge had been dismissed, and the son-in-law reinstated to his police position. Cox's attorney countered with the unsupported claim[4] that this state charge dismissal was part of the federal prosecution's deal with Berna in exchange for his trial testimony against Cox. The government attorney strongly denied any such assertion and denied knowledge that Berna may have been suspected of implication in such a state charge. During subsequent proceedings outside the presence of the jury, Berna denied any involvement in the arson charge, and further denied any discussions concerning this arson allegation with government agents.

The trial court's limitation on this cross-examination was within the bounds of his sound discretion. Cox's attorney failed to establish any sufficient basis for pursuing this questioning about what appeared to be an essentially irrelevant matter

[4] The only basis for this position was Cox's planned testimony that Berna had solicited this aid in the arson scheme.

with potential for unfair prejudice. *See United States v. Preston*, 608 F.2d 626 637 (5th Cir. 1979).

Cox's next contention is that reversible error occurred in the admission of evidence about other drug dealings besides the cocaine scheme and distribution charged in the indictment. Defendants Mancini and Bagbey join in this assignment. Cox and Bagbey essentially claimed that "other acts" evidence was outside the scope of the charged conspiracy; Mancini claimed that there was an insufficient showing of his involvement in the transaction. We find no error in the admission of the evidence in light of the circumstances involved at trial. The meeting, at which other drug dealing (quaaludes and marijuana) was discussed were inextricably interwoven with the charged conspiracy actions. The court invited requests for precautionary instructions in the process of receiving the evidence, which was not admitted for the purpose of showing general bad character of any defendant, but rather for the purpose of showing a common scheme, and the intent of the defendants so involved.[5] See *United States v. Aleman*, 592 F.2d 881

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[5] It should also be noted that the court gave the following limiting instruction when it charged the jury at the conclusion of the case:

> The defendants are not on trial for any charges other than those set forth in the indictment.
>
> However, the law permits evidence of other crimes, wrongs or acts to be considered by a jury for certain limited purposes. This evidence has been admitted in this case for such limited purposes relating to the charges contained in count one of the indictment [the conspiracy count].
>
> Testimony relating to such other crimes, wrongs, or acts may only be considered by you in connection with the question of a defendant's relationships, knowledge or intent regarding the charges contained in count one of the indictment.

(footnotes continued on next page)

(5th Cir. 1979); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978); *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982). The trial judge acted also within his sound discretion in deciding whether the evidence should have been admitted under F.R.E. 403. *See United States v. Vincent*, 681 F.2d 462, 465 (6th Cir. 1982).

Mancini's objection is different in nature, because the testimony concerning his involvement in the drug conspiracy is essentially entirely circumstantial. We find, however, sufficient evidence upon which the trial judge could reasonably find that a sufficient showing had been made to connect Mancini as a source or distributor of drugs to the other conspirators. The evidence admitted was relevant to show a relationship between Mancini and other defendants, by telephone records and calls as well as other testimony, and to show the requisite intent required to be proved, as well as identity of Mancini as a distributor in cocaine and other controlled substances. *See United States v. Roberts*, 548 F.2d 665, 667 (6th Cir.), *cert. denied*, 431 U.S. 931 (1977).

> You must first determine from all of the other evidence in the case whether you are satisfied beyond a reasonable doubt that a defendant did the acts charged in count one of the indictment. If you do so find, you may then, and only then, consider testimony regarding acts not charged in count one of the indictment. In determining whether in doing the act charged in count one of the indictment, and not because of mistake, or accident or other innocent reason.
>
> The reason why the law treats such "other acts" evidence, as it is called, in the way I have described is because the law recognizes that it would not be fair to put a defendant on trial for charges not contained in the indictment or call on a jury to speculate on a defendant's innocence or guilt of the charges in an indictment on the basis the defendant may have been guilty of other acts.

App. at 491-92.

Where the evidence about dealing in other drugs was part and parcel of the evidence which established the indictment charges and is essentially interrelated, such evidence is both relevant and probative, and here not outweighed by the danger of unfair prejudice. The evidence was not only admissible under F.R.E. 403 but was also admissible under F.R.E. 404(b). *See United States v. Marino*, 617 F.2d 76, 82 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980); *United States v. Smith*, 685 F.2d 1293, 1296 (11th Cir. 1982); *United States v. Cooper*, 577 F.2d 1079, 1088 (6th Cir. 1978); *United States v. Evans*, 697 F.2d 240 (8th Cir.), *cert. denied*, 103 S.Ct. 1779 (1983).

We find Cox's other challenge to Judge Cohn's actions and conduct towards his counsel during the trial to be meritless. We are satisfied that Cox and all defendants received an essentially fair trial. The law does not expect or require that a trial be *perfect*, especially in a hard fought trial involving multiple charges and multiple defendants.

MANCINI

Mancini's position concerning admitting evidence of other crimes, dealing in drugs other than cocaine, has been considered in respect to Cox's assertion of that issue. Mancini also asserts that the trial court committed error sufficient to warrant a new trial, because it refused to grant his motion for severance.

Surgical gloves were used to handle cocaine during the period of the activities of Berna, Frigerio, Cox, and others as charged in the indictment. Mancini's fingerprint was found on one of the gloves found in Cox's automobile. Telephone records were introduced showing numerous calls during the conspiracy period between Cox and Mancini's residence emanating to and from the Detroit area and Florida. Many of

these calls coincided with dates and times when Cox, Bagbey, Berna and Frigerio discussed obtaining cocaine and other drugs and made calls to Florida to the Mancini residence or other places which might reasonably have implicated Mancini as being a participant in these conversations. In at least one of these conversations, Mancini spoke to Berna and explained his difficulties in finding a pilot for the plane which was ferrying drugs to Florida from South America. In addition, Berna met with Cox and Mancini at a restaurant where they discussed shipments of cocaine, as well as other drugs, which Mancini was to deliver. We reiterate our conclusion that there was sufficient, closely related, evidence of Mancini's involvement in other drugs besides cocaine, during the same period of the cocaine conspiracy, to warrant the admission of "other crimes" evidence.

Mancini's argument on the severance issue related to Cox's testimony at trial that Mancini was Columbian. The government had refrained from any such nationality identification of Mancini pursuant to the court's order *in limine* to that effect. Before Cox testified, however, having been made aware of Cox's contentions that he was engaged in legitimate business dealings with Mancini in Columbia (and elsewhere), Mancini's council moved again to exclude any such reference by Cox to Mancini's nationality or about trips to Columbia. The court overruled this limit on Cox's theory of defense; this action is charged as error and basis for a mistrial.

Mancini relies primarily upon *United States v. Fields*, 458 F.2d 1194 (3rd Cir. 1972), and *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), for his contention. *Fields* involved the testimony of co-defendant Davis' spouse called as a witness by defendant Fields. There the court held that the proper procedure would have been to have granted Davis a severance, if requested, but that the failure to do so constituted harmless error, because her testimony was "equally

helpful to both defendants" to the effect that visits made were not for an illegal purpose. The spouse's testimony in *Fields* was not in any way to facilitate "the effort of the prosecution to convict him [Davis] of a crime." 458 F.2d at 1199. Similarly, in the instant case, Cox's testimony was not given to implicate Mancini in any criminal activity but rather to emphasize an alleged innocent and legitimate purpose of their association and visit to Columbia. There was, moreover, no special privilege involved in Cox's testimony as in *Fields*, which distinguishes that case as controlling authority for the proposition asserted by Mancini. Nor is *Meacham* persuasive authority under its unusual facts. The general principles applicable in determining whether Federal Rules of Criminal Procedure 14, dealing with relief from prejudicial joinder, mandates a severance is set out in *United States v. Jackson*, 549 F.2d 517, 523 29 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977). *Jackson* indicates that the co-defendant seeking severance must affirmatively demonstrate that joint trial prejudiced his right to a fair trial. The court stated in this respect:

> [a] defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than the evidence against him. . . . Severance becomes necessary where the proof is such that a jury could not be expected to compartmentalize the evidence as it relates to separate defendants.

549 F.2d at 525. A later case involving facts and circumstances more akin to this case is *United States v. Boyd*, 610 F.2d 521 (8th Cir. 1979), *cert. denied*, 100 S. Ct. 1052 (1980), which discusses *Jackson* in relation to a conspiracy charge and requests for severance:

> [T]he general rule [is] that persons charged in a conspiracy should be tried together, particularly where proof of the charges against the defendants is based upon the same evidence and acts. The motion to sever is addressed

> to the discretion of the trial court and a denial of severance is not grounds for reversal unless clear prejudice and an abuse of discretion are shown. A defendant must show something more than the fact his chances for acquittal would have been better had he been tried separately, he must affirmatively demonstrate the joint trial prejudiced his right to a fair trial.

610 F.2d at 525.

Another court describes the burden cast on a defendant to demonstrate that severance is necessary in this fashion:

> Co-defendants jointly charged are, *prima facie*, to be jointly tried. Fed.R.Crim.P. 8; *United States v. Gay*, 567 F.2d 916, 919 (9th Cir.) *cert. denied*, 435 U.S. 999. . .(1978). The granting or denial of a severance trial under Fed.R.Crim.P.14 is a matter within the trial court's discretion. . .The defendant must demonstrate that a joint trial is "so manifestly prejudicial that it outweighs the dominant concern with judicial economy and *compels* the exercise of the court's discretion to sever." *United States v. Brashier*, 548 F.2d 1315, 1323 (9 Cir. 1976), *cert. denied*, 429 U.S. 1111. . .(1977). Appellant's burden of demonstrating prejudice is a *difficult* one, and a trial judge's ruling will *rarely* be disturbed on review. *United States v. Campanale*, 518 F.2d at 359.

United States v. Doe, 655 F.2d 920, 926 (9th Cir. 1981) (emphasis added).

We do not believe that appellant Mancini has met his difficult burden to show a manifest abuse of discretion by the trial judge in denying his motion to sever under all of the circumstances. The evidence as to his activities was clearly less than the evidence implicating Cox and Bagbey. There was no emphasis whatever placed by the prosecution on Mancini's nationality and the mention of his Columbian background

was not shown to be so prejudicial so as to deny Mancini an essentially fair trial. We overrule, therefore, Mancini's contentions also.

GATT

Gatt also claims error in the denial of his motion for a severance, and relies on *United States v. Mardian*, 546 F.2d 973, 977 (D.C. Cir. 1976). In that famous Watergate trial, however, the compelling factor mandating severance was the fact that Mardian's lead counsel became ill during trial and required surgery which prevented his availability for several months, and Mardian's motion for severance due to that compelling circumstance was unopposed by the government. *Mardian* involved clearly different factors from those involving Gatt in this case, whose activities involved at least three cocaine transactions which Berna who "fronted" him each time with a quantity which Gatt later paid him for after sales had been consumated. Investigating officers corroborated Berna's testimony about his distributing drugs to Gatt by surveillance at Berna's apartment and they saw Gatt arrive during one of the cocaine transactions. Unquestionably, considerably less testimony concerning Gatt was introduced than testimony which involved the other defendants, but Gatt has also not carried his substantial burden of demonstrating actual prejudice; nor has he shown that the jury could not reasonably compartmentalize the testimony as to him and the other defendants. The authorities discussed in dealing with Mancini's contentions on severance also compel the conclusion that error has not been established in that regard.

Finally, Gatt contends, in effect, that there was insufficient evidence for his count one conspiracy conviction to stand. The evidence submitted as to Gatt's involvement, in our view, was enough for the conspiracy charge to be submitted to the jury

as to him. "[V]iewed in the light most favorable to the government," which is the proper standard, the evidence "could be accepted by a reasonably minded jury as adequate and sufficient to support the conclusion of defendant's guilt beyond a reasonable doubt." *United States v. Meyers*, 646 F.2d 1142, 1143 (6th Cir. 1981). It is well to point out that the jury in this trial reached different conclusions as to different defendants on trial on the conspiracy charges — Stodant was acquitted, and the jury could not agree as to Halim. This is objective evidence that the jury considered the proof separately as to each defendant; Gatt's involvement, although relatively at peripheral stages, was shown to have been repeated and the clear accomplice testimony was supported by corroborative proof.

Accordingly, the convictions of each of the defendants are AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HELUMAN

Clerk

No. 83-1012

In the Supreme Court of the United States

OCTOBER TERM, 1983

DAN BAGBEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court is obligated to rule prior to the defendant's testimony on a defense motion to restrict evidence that the prosecution might offer to rebut the defendant's expected testimony.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1983. The petition for a writ of certiorari was not filed until December 19, 1983, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and was sentenced to a term of four years'

imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 1a-15a).[1]

The evidence at trial, the sufficiency of which is not in dispute, is set out in the government's brief in the court of appeals (at 4-16). Briefly, it established that petitioner, a court officer in Westland, Michigan, met with various co-defendants, including Robert Cox, about the sale of quaaludes, marijuana, and cocaine. Although petitioner and Cox needed a pilot to fly large quantities of cocaine and marijuana into the United States from Colombia (*id.* at 5-6), they had access to a small amount of cocaine, a quarter-pound of which they delivered to co-defendant Anthony Berna for resale (*id.* at 6).[2] Berna delivered payment of $5700 for three ounces of cocaine to petitioner in an empty office at the Westland courthouse (*id.* at 8). Cox later acquired eight more ounces of cocaine, which he gave to Berna to sell (*id.* at 11). Berna met Cox and petitioner two days later and paid Cox approximately $8600 for about four ounces (*id.* at 12). Berna was arrested the next day when he met with an undercover agent to complete the sale of the remaining four ounces (*id.* at 13).

Prior to trial the government filed notice of its intent to offer for admission under Fed. R. Evid. 404(b) evidence of similar acts of misconduct committed by petitioner and co-defendants Halem, Mancini, and Catt within the dates of the charged conspiracy. The government did not specify what the particular acts were, but it proposed to make an offer of proof before it actually sought to introduce the evidence.

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[1] Petitioner was acquitted on a substantive count charging possession with intent to distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1).

[2] Berna pleaded guilty and testified for the government.

At trial, petitioner requested an advance offer of proof and a ruling on the admissibility of the proffered evidence prior to deciding whether to take the stand on his own behalf. Petitioner stated that if he testified he would acknowledge knowing several of his alleged co-conspirators socially and that he would then simply deny each allegation in the indictment. Accordingly, petitioner argued (Pet. 4), other acts of misconduct would be inadmissible because "none of the matters for which 'other acts' evidence might be allowed [would be] genuinely in issue" as a result of his testimony. In affirming his conviction, the court of appeals held (Pet. App. 3a) that petitioner was not entitled to an advisory ruling in advance regarding the admissibility of the prosecution's proposed rebuttal evidence and (*id.* at 4a) that, on the record made at the time of the request for the ruling, there was no basis for concluding in any event that such evidence would have been inadmissible.

ARGUMENT

Petitioner contends (Pet. 3-15) that he was improperly denied an advance ruling on the admissibility of evidence of other acts of misconduct to impeach him if he chose to testify at trial. The court of appeals, in a well-reasoned opinion (Pet. App. 2a-4a), properly rejected this claim.

1. We are not aware of any authority requiring a district court to rule in advance on an *in limine* motion such as petitioner's. On the contrary, the courts have held that it is generally within the trial judge's discretion not to rule on defense *in limine* motions. See *New Jersey* v. *Portash*, 440 U.S. 450, 462 n.1 (1979) (Powell, J., concurring); *United States* v. *York*, 722 F.2d 715 (11th Cir. 1984); *United States* v. *Luce*, 713 F.2d 1236, 1239-1240 (6th Cir. 1983) (citing cases), petition for cert. pending, No. 83-912;[3] *United States*

[3]The issue in *Luce*, in which we have acquiesced in the petition for a writ of certiorari, is entirely different from that here. The issue here is whether a trial judge is compelled to rule on a defendant's *in limine*

v. *Rivers*, 693 F.2d 52, 53-54 (8th Cir. 1982); *United States* v. *Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980); 608 F.2d at 1188 (Wallace, J., concurring); *id.* at 1190 (Kennedy, with Wright, Sneed, Choy, & Hug, concurring in part and dissenting in part); *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979). As the Sixth Circuit has pointed out, "[a] trial judge who declined to make a preliminary ruling on admissibility would be following a much safer course. If the defendant were to choose not to testify, no ruling need be made. If the defendant were to testify, the judge could rule on the impeachment after hearing the defendant's actual testimony." *United States* v. *Luce*, 713 F.2d at 1240.[4]

---

motion that is purportedly made for the purpose of permitting the defendant to make an informed choice regarding whether he should testify. The issue in *Luce* is whether a defendant may contest the correctness of a ruling actually made on such a motion if he decides not to testify, purportedly in reliance on the ruling, and is subsequently convicted. Even if the Court were to hold that a defendant who does not testify may nevertheless contest the validity of the *in limine* ruling, it would by no means follow that a trial judge would lack discretion to decline to make such a ruling.

[4]One case holds that under certain limited circumstances an advance ruling may be required when a defendant moves *in limine* to exclude the use of his prior convictions for impeachment. In *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), the court of appeals recognized that "[i]n the usual case, the district court • • • has discretion to refuse to rule in advance of trial on the admissibility of impeachment evidence" (*id.* at 1285). The court then held, however, that the unique facts of that case brought it "so far outside the ordinary situation" that the district court had abused its discretion in declining to make an advance ruling on the *in limine* motion. The court also noted that "an advance ruling [excluding the proposed impeachment] in a case such as this does not prevent the trial court from reconsidering its decision if it appears necessary, in the interests of justice, to permit the impeachment" (*id.* at 1286 n.2).

The instant case does not fall within the narrow reach of *Burkhead*. As the Eighth Circuit later explained, *Burkhead* does not mandate an advance ruling where, as here, the trial court lacks the facts necessary to make "an informed decision." *United States* v. *Rivers*, 693 F.2d 52, 54 (1982).

2. Even if petitioner were entitled to an advance ruling, so that on appeal the case should be treated as though the motion *in limine* had been denied, the court of appeals was correct in concluding that such a denial would not have been error. Nothing in petitioner's proffer or the government's notice of intent to offer evidence under Fed. R. Evid. 404(b) provided grounds for granting petitioner's motion at the time it was made. As the court of appeals correctly pointed out (Pet. App. 4a), even if petitioner on direct examination had done nothing more than to deny his involvement in the charged drug activities, that testimony would have been sufficient to place in issue "his intent, or even involvement in a common plan, pattern or scheme." In denying the allegations of conspiracy and possession with intent to distribute, petitioner would have placed in issue his willfulness and specific intent to join in the conspiracy, as well as his knowledge, preparation, plan, and absence of mistake or accident. *United States* v. *Hamilton*, 684 F.2d 380, 384 (6th Cir.), cert. denied, 459 U.S. 976 (1982); *United States* v. *Lippner*, 676 F.2d 456, 461-462 (11th Cir. 1982). Additionally, depending perhaps on petitioner's precise testimony on direct examination, evidence of other acts might have been admissible to illustrate his relationship with his co-conspirators and to contradict his suggestion that all of his dealings with them were innocent. *United States* v. *Legendre*, 657 F.2d 238, 242 (8th Cir.), cert. denied, 454 U.S. 1037 (1981).

Indeed, even if petitioner had not testified at all, evidence of other crimes probative of the intent and knowledge needed for conviction of the charged offenses would appear to have been admissible in the government's case in chief. *United States* v. *Legendre*, 657 F.2d at 242; *United States* v. *Adcock*, 558 F.2d 397, 402 (8th Cir.), cert. denied, 434

U.S. 921 (1977).[5] Since the evidence in question was not in fact introduced by the prosecution at trial, and since its admission under Rule 404(b) would not depend on whether petitioner testified, it is difficult to see how petitioner could complain about the refusal to rule the evidence inadmissible in advance.

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[5]As the court of appeals noted (Pet. App. 3a), petitioner's reliance (Pet. 7-8) on *United States* v. *Ring*, 513 F.2d 1001, 1007-1008 (6th Cir. 1975) is misplaced. In *Ring*, the defendant raised a defense of amnesia and did not otherwise contest intent. In this case, petitioner's proffer that he would deny each allegation did nothing to eliminate intent as an issue. Similarly, neither *United States* v. *Benedetto*, 571 F.2d 1246 (2d Cir. 1978), nor *United States* v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979) (Pet. 9-10), supports petitioner's argument. In *Benedetto*, the court questioned the admission of similar act evidence to prove intent because intent was "not really in dispute" (571 F.2d at 1249). However, the court approved admission of the evidence to refute the defendant's testimony (*id.* at 1250). Here, there was some likelihood both that petitioner's testimony would have placed intent squarely in issue and that it would have opened the door for admission of the Rule 404(b) evidence under the precise rationale adopted in *Benedetto*. *Manafzadeh* likewise involved a defendant who did not contest intent. In that case, the majority noted that "any doubt about [the] nonexistence as an issue [of defendant's intent] was dispelled by the offer of the defendant to stipulate to the existence of the requisite intent if the other elements of the offense should be found" (592 F.2d at 87). The court also specifically rejected the probative value of the evidence of similar acts to show knowledge (because that was not an element of the charged offense), or to show plan or absence of mistake (because the other acts, which occurred after the charged offense, were not part of the same transaction or a continuing scheme). In this case, by contrast, not only was intent potentially at issue, but the similar acts took place at the same time and involved the same persons. Significantly, in *Ring*, *Benedetto*, and *Manafzadeh* the challenged evidence was actually admitted at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1984

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